Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

Joan Davis
Petitioner

v.

New Jersey Bell
Respondent

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

JOAN DAVIS
420 SOUTH 11TH STREET
JACKSONVILLE BEACH, FL 32250
(904) 273-6131

57pp

## QUESTIONS PRESENTED

Do the Florida Statutes 440.101, Legislative intent: drug-free workplaces and 440.102(f), Drug-free workplace program requirements prove by preponderance of the evidence that Davis had a offer of employment when she successfully passed a drug test upon applying for employment with Southern Bell in Jacksonville, Florida but for New Jersey Bell telling Southern Bell adverse information in violation of a contract that Davis had been terminated? If so, is Davis entitled to compensatory damages for a job that would have paid her 30,000 dollars a year? And should Davis be awarded punitive damages?

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No._____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

OCTOBER TERM, 1993

JOAN DAVIS
PETITIONER

VS.

NEW JERSEY BELL
RESPONDENT

---

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

---

Petitioner, Joan Davis, respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States District Court and United Stated Court of Appeals for the Third Circuit refusing to award compensatory damages for breach of contract by appellee New Jersey Bell and punitive damages.

## OPINIONS BELOW

The Opinion of the Court of Appeals appears in Appendix B. The unpublished written opinion of the District Court appears in Appendix A. The Petition for Rehearing Denied appears in Appendix C and The Order to grant a motion for leave to file a Petition for Rehearing out of Time appears in Appendix D.

## JURISDICTION

The Court of Appeals' Opinion in this matter was filed on January 6, 1994. A Motion for leave to file the Petition for Rehearing out of Time was Filed on February 12, 1994 and the motion was granted March 2, 1994 by the Court, Chief Judge, Sloviter, and is set for in Appendix D. The Court of Appeals' denial of the Petition for Rehearing was issued on March 11, 1994 and

is set forth in Appendix C. This Court's jurisdiction is invoked under Title 28, U.S.C. $ 1254 (1).

## STATEMENT OF THE CASE

The United States District Court, District of New Jersey, had jurisdiction pursuant to Title 18, U.S.C. $ 3231. Petitioner-Appellant Joan Davis is a former New Jersey Bell employee residing in Florida. Respondent-Appellee New Jersey Bell is a corporation of the State of New Jersey with its principal place of business in Newark, New Jersey.

Davis was employed at New Jersey Bell as a directory assistance operator from October 24, 1969 to October of 1987. Davis was fired after she was allegedly and falsely accused of harassing a co-worker. CWA union leaders filed a grievance with the

company and arbitration followed. The arbitration resulted in a settlement agreement between the two parties as the accuser quit her job after Davis was terminated and did not show at the arbitration. The company agreed Davis' employment records would reflect a resignation in goodstanding and Davis would receive service credit from October 24, 1969 through February 1, 1989 for purposes of pension and seniority.

In April 1990, Davis applied for a clerical position in Southern Bell's engineering department. Davis was given a test, an interview and a drug test. Davis successfully passed them all and there was no testimony offered to the contrary. (See Transcript page 12 lines 17 - 25 and p. 13 lines 1 - 12). Plaintiff did not have the benefit of Hilda Mcleod to corroborate her

testimony at trial as her request to have Mcleod of Southern Bell subpoenaed was denied on April 28, 1991, by Magistrate Ronald J. Hedges.

After Davis was tested, Hilda Mcleod, Southern Bells assistant manager contacted New Jersey Bell regarding Davis years of service and status and was told by New Jersey Bell, Davis was terminated. According to the Florida Statute 440.102(f) Drug-free workplace requirements-

> "Job applicant' means a person who has applied for a position with an employer and has been offered employment conditioned upon successfully passing a drug test".

Davis already had the promise of employment when Southern Bell contacted New Jersey Bell. Further stated, Florida 440,101 Legislative intent; drug-free workplace-

"It is the intent of the

Legislature to promote drug-free workplaces in order that the employers in the state be afforded the opportunity to maximize their levels of productivity, enhancetheir competitive positions in the market-place, and reach their desired levels of success without experiencing the cost, delays, and tragedies associated with work-related accidents resulting from drug abuse by employees. It is further the intent of the Legislature that drug abuse be discouraged and that employees who choose to engage in drug abuse face the risk of unemployment and the forfeiture of workers' compensation benefits. If an employer implements a drug-free workplace program which includes notice, education, and testing for drugs and alcohol pursuant to rules developed by the division, the employer may require the employee to submit to a test for the presence of drugs or alcohol and, if drugs or alcohol is found to be present in the employee's system at a level prescribed by rule adopted pursuant to this act, the employee may be terminated and shall forfeit his eligibility for medical and indemnity benefits upon exhaustion of the procedures prescribed in s.440,102(5). However, a drug-free workplace program shall require the employer to notify all employees that it is a condition of employment to refrain from taking drugs on and off the job and if the injured worker refuses to submit to a test for drugs or alcohol, he forfeits his eligibility for medical and indemnity benefits.

The District Court found in favor of the defendant, New Jersey Bell, on claims of

negligent infliction of emotional distress, intentional infliction of emotional distress, tortious interference with economic advantage and defamation. The District Court in favor of the Plaintiff, Joan Davis, on the claim of breach of contract, in the amount of 1 dollar as nominal plus court cost and is set forth in Appendix A.

Davis then filed an appeal with the United States Appeals Court for the Third Circuit appealing nominal damages for breach of contract and tortious interference with economic advantage. The appeal was dated September 8, 1993.

In the Memorandum Opinion of the Court, the Court affirms the judgement by the District Court. The Court upholds that it was not a reasonably certain consequence that Davis would have been hired at Southern

Bell but for the employment records reflecting Davis was terminated rather than resigned in goodstanding. The Memorandum Opinion is set forth in Appendix B.

## REASONS FOR GRANTING THE WRIT

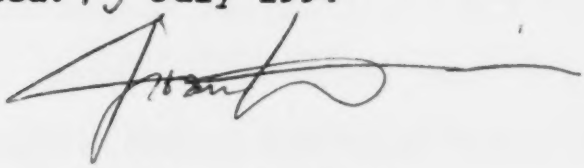
Certiorari should be granted for the following reasons: Petitioner has located a Florida Statute that will show as a matter of law that there was a promise of employment when the Petitioner Joan Davis was given a drug test and successfully passed it. There are also two United States Codes namely Subtitle D-DRUG-FREE WORKPLACE ACT OF 1988 (TITLE 41, SECTION 5152) AND SUBTITLE F-DRUG-FREE AMERICA POLICY (TITLE 21, SECTION 5251) that support drug testing conditioned to hiring. Also the fact that Davis was never a clerk before in the engineering department, does not legally or

otherwise mean Davis was not qualified. Having been a clerk before was not a requirement. Florida Statutes 440.101, Legislative intent; drug-free workplaces and 440.102(f) drug-free workplace program requirements unequivocally and specifically proves Davis had the promise of employment. The Opinion of the Court is not supported by law. Finally, the Court does agree that legally New Jersey Bell did indeed breach a contract with Davis. Therefore Davis is entitled to compensatory damages rather than nominal damages that the Court upholds.

## CONCLUSIONS

For the reasons set forth, a writ of certiorari should issue to review the judgement and opinion of the Court of Appeals, and of the District Court in this matter.

**Dated:** 15 **July 1994**

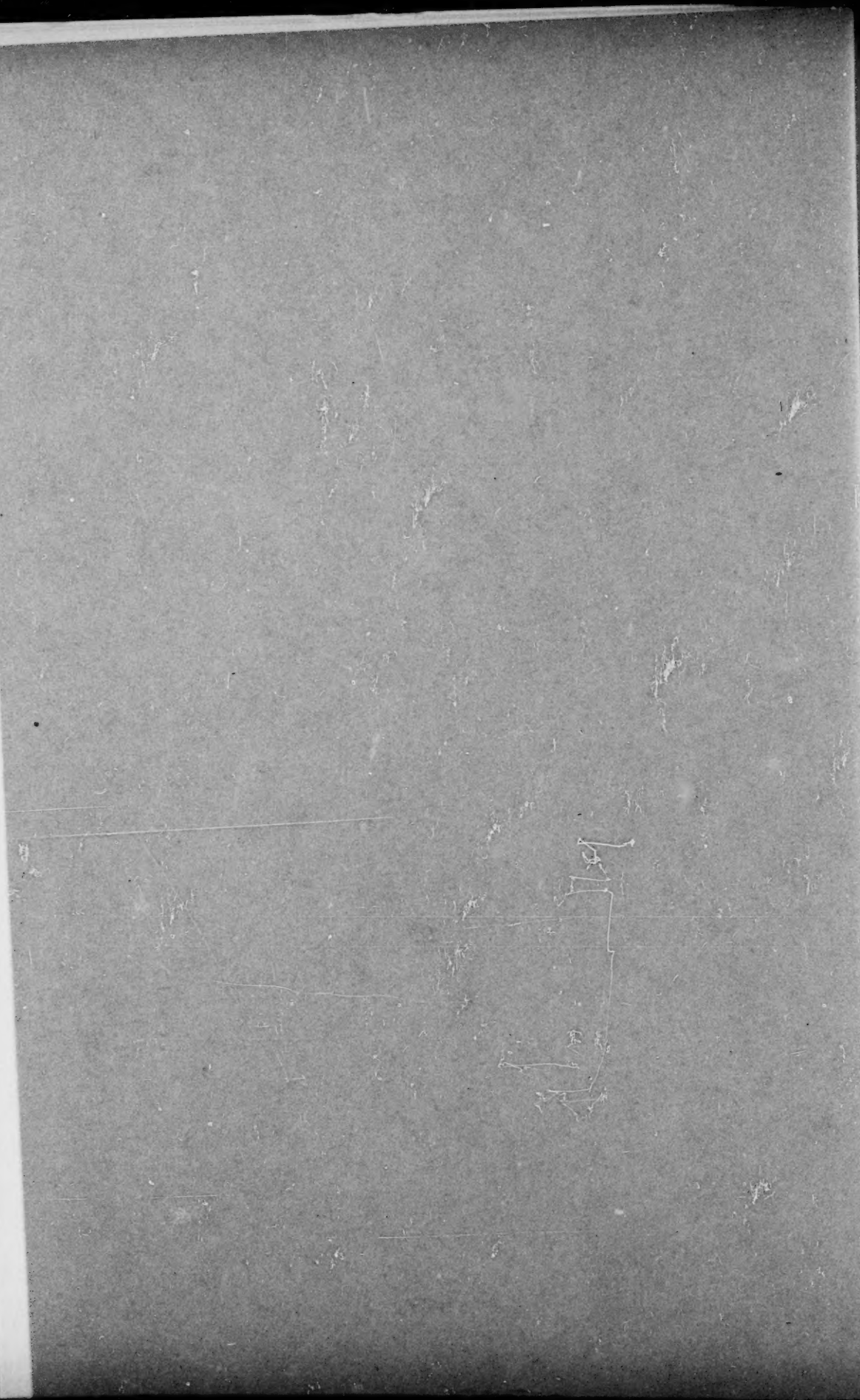


**Respectfully submitted,**

**Joan Davis**

**Pro Se**

# A P P E N D I X



UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOAN DAVIS,
Plaintiff,

v. Civil Action No. 90-4219 (WGB)
JUDGEMENT

NEW JERSEY BELL,
Defendant.

This action having come been tried before the Court, the Honorable William G. Bassler, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered; and

For the reason set forth in the Court's opinion filed this day; and

For good cause shown;

It is on the 28th day of April, 1993 hereby ORDERED that judgement be entered in favor of the defendant, New Jersey Bell, on the claims of negligent infliction of emotional distress, intentional infliction of emotional distress, tortious interference

with economic advantage and defamation; and

It is further ORDERED that judgement be entered in favor of the plaintiff, Joan Davis, on the claim of breach of contract, in the amount of one (1) dollar as nominal damages, plus court costs.

---

WILLIAM G. BASSLER, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOAN DAVIS,
Plaintiff,

v. Civil Action No. 90-4219 (WGB)
OPINION

NEW JERSEY BELL,
Defendant.

BASSLER, DISTRICT JUDGE:

The plaintiff pro se, Joan Davis, filed this lawsuit seeking damages arising, in part, from an alleged breach of a settlement agreement under which Davis was allowed to resign in good standing from her employment with the defendant, New Jersey Bell. The court held a bench trial on all claims on March 31, 1993.

At the conclusion of the plaintiff's case, the Court granted the defendant's motion for judgement as a matter of law under Fed. R. Civ. P. 50 (a) on four of the five claims (negligent infliction of

emotional distress, intentional infliction of emotional distress, tortious interference with economic advantage and defamation). The defendant did not produce its own witnesses at trial.

The Court sets forth below its findings of fact and conclusions of law concerning both the four claims for which judgment as a matter of law was entered under Rule 50(a) during trial and the claim for which the Rule 50 (a) motion is denied, breach of contract. For the following reasons, the Court enters judgement in favor of the defendant on the four, non-breach of contract claims. The court enters judgement in favor of the plaintiff on the breach of contract claim and awards the plaintiff nominal damages and court costs.

Pursuant to Fed. R. Civ. P. 52, the Court makes the following findings of fact

and conclusion of law:

I. FINDINGS OF FACT

New Jersey Bell employed Davis as a directory assistance operator for more than 18 years, from October 24, 1969 until her dismissal for allegedly harassing a co-worker on November 5, 1987. Davis' collective bargaining representative, the Communications Workers of America, ["CWA"] grieved her discharge. (Defendants' Statement of Facts at 1-2.)

An Arbitrator, George Nicolau held a hearing on the matter on February 2, 1989. Both parties were represented by counsel: Steven P. Weissman, Esq. represented the CWA. Mary Rogers, Esq. represented New Jersey Bell. At the hearing, the parties agreed to the following:

> (1) New Jersey Bell agreed to expunge from Davis' personnel files all charges relating to the October 24, 1987 and October 29,

1987 incidents which led to her dismissal;

(2) New Jersey Bell agreed that Davis' records would reflect her resignation in good standing, effective February 1, 1989. Davis would receive service credit from October 24, 1969 through February 1, 1989 for purposes of pension and seniority;

(3) New Jersey Bell agreed to give Davis $8,500 in back pay, minus appropriate deductions;

(4) Davis waived all other claims she might have to back pay;

(5) New Jersey Bell agreed to provide Davis with the following letter of reference: "Miss Joan Davis was employed as a directory assistance operator by New Jersey Bell Telephone Company from October 24, 1969 through February 1, 1989. While in our employ Miss Davis maintained a satisfactory level of attendance and punctuality. The quality of her work was consistently outstanding and the other aspects of her performance were satisfactory or better. Miss Davis resigned to return to Florida."; and

(6) The CWA agreed to withdraw the matter from arbitration in consideration of the above promises by New Jersey Bell.

(Exhibit D-1, Transcript of Arbitration Hearing, at 2-3)

Pursuant to the settlement agreement, New Jersey Bell on the day of the hearing gave Davis a copy of the above letter of reference, signed by J.J. Hackett, Director of Operator Services. Davis then moved to Florida, where she applied in early 1990 for a clerical position in the engineering department of Southern Bell in Jacksonville. (Defendant's Statement of Facts at 3.)

The defendant's counsel, Mary B. Rogers, Esq., has represented to the Court that, at the time Davis applied for employment with Southern Bell, there was no corporate or other business relationship between the defendant and Southern Bell. Prior to January 1, 1984, Southern Bell and the defendant were separate subsidiaries of AT&T.

Hilda McLeod, a Southern Bell assistant manager, interviewed Davis for the clerical

position in the engineering department. According to Davis, McLeod told her that here was a clerical job available for her and that she was ready to hire Davis, but she would first need to call New Jersey Bell to verify Davis' employment there. (Plaintiff's Letter of February 7, 1993 at 4.) Davis admitted she did not provide Southern Bell with a copy of the reference letter given to her by New Jersey Bell as part of the settlement agreement. She also admitted on cross examination at trial she had no clerical or engineering experience.

McLeod telephoned New Jersey Bell's payroll department and spoke with a non-management employee, systems analyst Bob Yeager. When Yeager checked Davis' employment record on the computer, he found movement code of "66", indicating that Davis had been terminated. Yeager, relying on the

computer records, told McLeod that New Jersey Bell had terminated Davis. (Defendant's Statement of Facts 3.)

As the defendant did not put any witnesses on the stand and Davis presented only herself as a witness, the Court does not have the benefit of Yeager's own recollection of what he told McLeod concerning Davis. The Defendant's Statement of Facts states at Page 3 that:

> ... Yeager had no access to any information beyond the code and had no details concerning the circumstances of plaintiff's dismissal. Consequently, Yeager told McLeod nothing other than that plaintiff had been terminated. McLeod had no contract or conversations with any other NJB employee concerning plaintiff's employment with the Company.

The parties do not dispute that Yeager informed McLeod that Davis had been terminated. By letter dated April 19, 1990, McLeod notified Davis that Southern Bell was unable to offer her employment. (Id. at 3.)

At trial, New Jersey Bell informed the Court that the computer database in question was not changed until June 8, 1990.

Davis then brought this action, seeking damages of $5 million. She pleads five causes of emotional distress, intentional infliction of emotional distress, tortious interference with economic advantage and defamation.

The Court had diversity jurisdiction under 28 U.S.C. § 1332. Davis is a citizen of Florida. New Jersey Bell is a New Jersey Corporation with its principal place of business in New Jersey.

II. CONCLUSIONS OF LAW

A. Breach of Contract

The parties do not dispute that New Jersey law applies. The sole source of Davis' alleged contract rights is the February 2, 1989 settlement agreement. In

this agreement, New Jersey Bell promised "that Joan Davis' records will reflect her resignation in good standing effective February 1, 1989." (Exhibit D-1, Transcript of Arbitration Hearing, at 2.)

The court concludes that New Jersey Bell breached the agreement by failing to update the computer database to show that Davis resigned in good standing, and instead allowing the database to show that she was terminated. The Court, however, concludes that Davis has failed to prove she sustained damages as a result of the breach.

Contract remedies fall into three general categories: restitution, compensatory damages and specific performance. See Donovan v. Bachstadt, 91 N.J. 434, 443-44 (1982). Davis here seeks only to be compensated for economic and emotional damages allegedly caused by the

breach, including loss of prospective earnings at Southern Bell. She does not seek restitution of any benefit conferred upon the defendant, nor does she seek specific performance of the settlement agreement.

In the words of the New Jersey Supreme Court:

> Compensatory damages are designed to put the injured party in as good a position as he would have had if performance had been rendered as promised. What that position is depends upon what the parties reasonable expected. It follows that the defendant is not chargeable for loss that he did not have reason to foresee as a probable result of the breach when the contract was made.

Id. at 444. (citations omitted). Through the aggrieved party need not ascertain the exact amount of the loss, "the loss must be a reasonably certain consequence of the breach." Id. at 445. (citations omitted).

Here, Davis had not proven that her failure to be hired to a clerical position with Southern Bell was "a reasonably certain consequence" of New Jersey Bell's breach of the settlement agreement. Nor has seen shown that her damages, assuming they were a reasonable certain consequence, were reasonable foreseeable by the parties at the time the agreement was reached.

Davis has failed to produce sufficient evidence to prove that Southern Bell's decision not to hire her resulted, in significant part, from the defendant's failure to update her employment records in the computer. Davis had merely presented her own, uncorroborated, testimony that Southern Bell was prepared to hire her until it received computer information from New Jersey Bell concerning her termination.

Furthermore, the Southern Bell job was

for clerical work in the engineering department. Davis admitted on cross examination at trial that she had not worked previously in a job related to engineering and had no clerical experience.

The Court also concluded that New Jersey Bell, at the time of the contract, would not have reasonably foreseen that Davis, when applying for a job, would neglect to submit the letter of reference, thus requiring the prospective employer to call New Jersey Bell to verify her employment there. New Jersey Bell provided this letter, in part, with the reasonable expectation that Davis would present it when applying for future employment. Therefore, she cannot recover compensatory damages, having failed to provide that letter.

Under New Jersey law, however, Davis is entitled to nominal damages. Generally,

whenever there is a breach of contract, or an invasion of legal right, the law presumes that damages resulted. If actual damages cannot be proven, the law "vindicates that right by awarding nominal damages." Nappe v. Anschelewitz, Barr, Ansell, & Bonello, 97 N.J. 37, 45-46 (1984). (citations omitted). The Court enters judgement in favor of Davis on the breach of contract claim and awards her nominal damages of one dollar, plus court costs. See A. Farnsworth, Contracts, 838-39 (1982).

B. Negligent Infliction of Emotional Distress

The court has already ruled from the bench that judgment should be entered as a matter of law under Rule 50(a) on the non-breach of contract claims. It will set forth here the conclusions of law below upon which it bases those rulings.

Davis alleges that New Jersey Bell's negligent release of the computer information concerning her "termination" caused her emotional distress. The court finds that she failed to prove such a cause of action and enters judgement for the defendant on this claim.

To establish liability for the tort of negligent infliction of emotional distress, a plaintiff must show, at a minimum, "negligent conduct that is the proximate cause of emotional distress in a person to whom the actor owes a legal duty to exercise reasonable care." Decker v. Princeton Packet, 116 N.J. 418, 429 (1989). (citation omitted). To recover on this tort, a plaintiff must show that it is "reasonably foreseeable that the tortious conduct will cause genuine and substantial emotional distress or mental harm to average persons."

Id. (citations omitted).

The Court concludes, as a matter of law, that Davis' emotional distress is not sufficiently genuine and substantial to permit recovery under this tort. Furthermore, even if her distress were substantial enough, the Court concludes that New Jersey Bell's conduct in failing to update the computer database is not a reasonably foreseeable source of such genuine and substantial emotional harm.

Davis says that because of the defendant's conduct she had spent many nights without sleep, never feels relaxed, and experiences a sensation of heaviness in her shoulders and back. These complaints, however, do not constitute emotional distress sever enough to recover under New Jersey Law.

In cases involving allegations of

infliction of emotional distress, whether through negligent or intentional conduct, New Jersey courts have required a high standard of severity. In Buckley v. Trenton Savings Fund Soc'y, 111 N.J. 355, 368 (1988), the court concluded that the plaintiff had failed to show sufficient emotional distress, observing that his "complaints amount to nothing more than aggravation, embarrassment, an unspecified number of headaches and loss of sleep." In similar fashion, Davis' complaints amount to nothing more than loss of sleep, aggravation, and a certain heavy sensation in her shoulders and back.

Moreover, the Court concludes that the inadvertent failure to update a computer database concerning a person's employment record, as a matter of law, is not tortious conduct which, it is reasonable to foresee,

would cause genuine and substantial emotional harm. The New Jersey Supreme Court, for example, held in Decker that emotional distress proximately caused by the publication of a false obituary in a newspaper was not sufficiently substantial to constitute a compensable injury. 116 N.J. at 433. In light of that holding, the Court concludes that the distress caused by the conduct complained of here is also not sufficiently substantial.

C. Intentional Infliction of Emotional Distress

For the reasons discussed above in the context of negligent conduct, the Court concludes that Davis has also failed to prove emotional distress severe enough for recovery under New Jersey law for the tort of intentional infliction of emotional

distress. See Buckley, 111 N.J. at 368. Therefore, the Court enters judgement in favor of New Jersey Bell on this claim.

Furthermore, the Court finds that New Jersey's Bell's action, inadvertently failing to update a computer database concerning Davis' employment record, is not the "extreme and outrageous conduct" necessary for recovery under New Jersey law for intentional infliction of emotional distress. The Court finds the defendant's conduct, while a breach of the settlement agreement and perhaps negligent, is not "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Id., quoting Restatement (Second) of torts, § 46 comment d (1965).

D. Tortious Interference with Economic Advantage

Davis also alleges that New Jersey Bell maliciously interfered with her attempts to secure a job with Southern Bell, committing a tort under New Jersey law. For the following reasons, the Court enters judgement for the defendant on this claim.

To prove tortious interference with economic advantage, a plaintiff must show: (1) some sort of protectible right, i.e. an existing or prospective economic relationship; (2) "malice;" ( 3) causation; and (4) damages. Printing Mart V. Sharp Electronics, 116 N.J. 739, 751 (1989). For the purpose of this tort, "malice" is not used in its more literal sense of "ill will," but rather indicated that the harm was "inflicted intentionally and without justification or excuse." Id. (citations

omitted).

Here, Davis has failed to prove "malice." There was no evidence showing that New Jersey Bell, in providing information to Southern Bell that Davis was terminated, acted "intentionally and without justification or excuse." At most, the defendant acted negligently in providing this information.

Furthermore, Davis has failed to prove a protectible right. She has not shown that the defendant's conduct, even if intentional, led to her being rejected for the Southern Bell position. As mentioned earlier, Davis admitted on cross examination that she had no clerical or engineering experience, but had worked only as a directory assistance operation. Therefore, she had no reasonable expectation or employment with Southern Bell.

E. Defamation

Davis also alleges that her reputation was harmed by the defendant's release of information concerning her termination of employment. For the following reasons, the Court enters judgement for the defendant on this claim.

First, assuming that the statement was defamatory Davis has failed to show any damage from the publication of the allegedly slanderous information concerning her termination. As mentioned earlier, she has failed to show that her failure to be hired at Southern Bell resulted from the release of that information.

Second, the Court concludes that the defendant had a qualified privilege which extends "to an employer who responds in good faith to the specific inquires of a third party regarding qualifications of an

employee." Erickson v. Marsh & McLennon Co., 117 N.J. 539, 562 (1990). Here, the defendant was responding in good faith to the specific inquiries of a third party, Southern Bell, regarding Davis' qualifications.

Such a qualified privilege is only overcome through a showing of "malice," which means in this context that the person "publishing" the statement "knew the statement to be false or acted in reckless disregard of its truth or falsity." Dairy Stores v. Sentinel Publishing Co., 104 N.J. 125, 151 (1986). A plaintiff must prove such "malice" by clear and convincing evidence. Erickson, 117 N.J. at 565. (citations omitted).

Davis has failed to produce clear and convincing evidence that New Jersey Bell released the information concerning her

termination either knowing the information to be false of in reckless disregard of its truth or falsity. At most, New Jersey Bell acted negligently in this regard.

III. CONCLUSION

For the reasons discussed above, the Court enters judgement in favor of the defendant, New Jersey Bell, on the claims of negligent infliction of emotional distress, intentional infliction of emotional distress, tortious interference with economic advantage and defamation. The Court enters judgement in favor of the plaintiff Joan Davis, on the breach of contract claim, awarding her nominal damages of one dollar, plus court costs. An appropriate order entering judgement follows.

Date: _____

_____

WILLIAM G. BASSLER, U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5322

Joan Davis,
Appellant
v.

New Jersey Bell

On Appeal from the United States District Court for the District of New Jersey
(D>C. Civil No. 90-04219)
District Judge: Hon. William G. Bassler

Before: SlOVITER, Chief Judge, COWEN AND LEWIS, Circuit Judges

JUDGEMENT

This cause cane to be heard on the record from the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit LAR 34.1 (a) on December 17, 1993.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court entered April 29, 1993 be, and the same is, hereby

affirmed. Each party to bear its own costs.

Attest:

_____

Chief Deputy Clerk

**Dated: January 6, 1994**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5322

Joan Davis,
Appellant
v.

New Jersey Bell

On Appeal from the United States District Court for the District of New Jersey
(D>C. Civil No. 90-04219)
District Judge: Hon. William G. Bassler

Submitted Pursuant to Third Circuit LAR
December 17, 1993
Before: SLOVITER, Chief Judge COWEN AND LEWIS, Circuit Judges

(Filed January 6, 1994)

MEMORANDUM OPINION OF THE COURT

SLOVITER, Chief Judge.

I.

Defendant New Jersey Bell Telephone Company terminated the employment of

plaintiff Joan Davis on November 5, 1987 because she allegedly harassed a co-worker. During arbitration of the grievance arising out of Davis's dismissal, a settlement was reached. New Jersey Bell agreed, inter alia, that its employment records would describe her separation from the company as a "resignation" rather than a "termination." Davis subsequently applied for a clerical position with Southern Bell in Florida. After Davis's interviewer contacted New Jersey Bell had breached its agreement with Davis by not having changed the employment records to state that she had resigned. However, the court awarded only one dollar nominal damages because it found that Davis had not proved compensatory damages. The court also found, at the close of Davis's evidence, that her proof on her claims of negligent and intentional infliction of

emotional distress, defamation and tortious interference with economic advantage was legally insufficient.

Davis appeals.

ii.

Federal Rule of Civil Procedure 52 (a) dictates that as an appellate court reviewing factual findings of a trial court, we cannot set aside those findings unless they are "clearly erroneous." That is a high standard under which "a finding of fact may be reversed on appeal only if it is completely devoid of a credible evidentiary basis or bears no rational relationship to the supporting data." Haines v. Liggett Group, Inc., 975 F 2d 81, 92, (3d Cir. 1992).

The district court found that it was not a reasonably certain consequence that Davis would have been hired by Southern Bell

but for the New Jersey Bell records stating she was terminated. The court based this finding on the absence of corroboration for Davis's testimony that she would have been hired had New Jersey Bell updated its computer records to reflect Davis' resignation. The court noted that the job for which Davis interviewed was a clerical job in Southern Bell's engineering department and Davis had never done clerical or engineering work. We cannot hold that the court's finding was clearly erroneous.

We sympathize with Davis's frustration. New Jersey Bell was wrong in not changing the records earlier. It did breach its contract with her. However, in order to award Davis compensatory damages, more than proof of New Jersey Bell's breach is needed. What is also needed is proof that Davis suffered foreseeable, ascertainable damages

as a result of that breach.

Davis had a burden to prove damages and the only proof she offered was her own uncorroborated testimony. The district court decided that that was not enough proof. We cannot hold that it was clear error on its part to have done so.

The district court adequately dealt with the remainder of Davis's claims, and no further discussion is needed here on them.

For the foregoing reasons, we will affirm the judgment of the district court.

---

TO THE CLERK:

Please file the foregoing opinion.

_____
Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5322

JOAN DAVIS
v.
NEW JERSEY BELL

---

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge, BECKER STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAAD, ALITO, ROTH AND LEWIS, Circuit Judges

The petition for rehearing filed by Appellant Joan Davis in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for

rehearing by the court in banc, the petition for rehearing is denied.

By the Court

_____

Chief Judge

Dated: March 11, 1994

February 28, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No 93-5322

RE: Joan Davis, Appellant vs. New Jersey Bell

**Present:** SLOVITER, Chief Judge

1. Motion by Appellant for Leave to file Petition for Rehearing out of time.

2. Copy of the unfiled Petition for Rehearing.

3. Copy of Letter Opposition by Appellee to above motion.

4. The Memorandum Opinion was filed and judgement entered on 1/6/94. The certified judgement issued in lieu of a formal mandate on 1/31/94.

_____

Carolyn Hicks, Deputy Clerk
Direct Dial 597-3143

ORDER

The foregoing Notion by appellant for leave to file Petition for Rehearing out of time is granted.

By the Court

_____
Chief Judge

Dated: March 2, 1994

1d

Supreme Court, U.S.
FILED
AUG 18 1994
OFFICE OF THE CLERK

(2)

No. 94-114

In The

# Supreme Court of the United States

October Term, 1994

JOAN DAVIS,

*Petitioner,*

v.

NEW JERSEY BELL,

*Respondent.*

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## BRIEF IN OPPOSITION

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No. 94-114

In The

# Supreme Court of the United States

October Term, 1994

JOAN DAVIS,

*Petitioner,*

v.

NEW JERSEY BELL,

*Respondent.*

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## BRIEF IN OPPOSITION

In her petition for certiorari, petitioner has raised issues not presented below and has misstated the bases of the decisions of the Court of Appeals and the District Court. Certiorari should be denied because:

1) this case does not present any federal question and the petition is based upon issues not presented to or ruled upon by the Court of Appeals.

## STATEMENT OF THE CASE

Petitioner filed suit against respondent, her former employer, alleging breach of contract, negligent and

intentional infliction of emotional distress, tortious interference with economic advantage and defamation. Jurisdiction was based upon diversity of citizenship as petitioner relocated to Florida following her termination from respondent's employ. Respondent is a New Jersey corporation.

At the conclusion of a bench trial, the District Court, applying New Jersey law, found a breach of contract but refused to award compensatory damages because petitioner failed to prove that Southern Bell's refusal to hire her was a foreseeable, reasonably certain consequence of respondent's breach of contract. (A. 11a-14a) The Court of Appeals affirmed, citing the "clearly erroneous" standard of Federal Rule of Civil Procedure 52 (a). (A. 5b-7b)

Petitioner's claims were resolved solely upon the basis of state law. No federal question was presented at any stage of the proceedings in this matter. In her petition for certiorari, petitioner points to a Florida statute and to certain sections of the United States Code in an effort to overturn the factual findings of the trial court, affirmed by the Court of Appeals. These arguments were not raised below and do not warrant the granting of a writ of certiorari.

## REASON WHY THE PETITION SHOULD BE DENIED

### I. This Case Does Not Present Any Federal Question And The Petition Is Based Upon Issues Not Presented To Or Ruled Upon By The Court Of Appeals.

Rule 10.1 provides that this Court will grant certiorari "only when there are special or important reasons therefor." Rule 10.1 describes the type of reasons which ordinarily govern the granting of review on writ of certiorari. None is present in this case.

This case was decided based upon New Jersey law. No federal question was pleaded, argued or decided. This Court has consistently declined to review the judgments of federal courts dealing with issues of state law. As the Court stated in *Butner v. United States,* 440 U.S. 48, 58 (1979), "federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues." Unless the federal court's determination of state law is "unreasonable," this Court will not review it. *Propper v. Clark,* 337 U.S. 472, 486-487 (1949). The decision of the Court of Appeals was not unreasonable; to the contrary, it correctly applied the clearly erroneous standard appropriate to the review of the factual findings of the trial court.

The petition suffers from the additional flaw of presenting arguments not raised or considered below. Petitioner seeks reversal in order to advance arguments based upon state and federal statutes which were not asserted at any stage of the proceedings in this case. As Justice Scalia reiterated in *U.S. v. Williams,* ___ U.S. ___, 112 S.Ct. 1735, 1736 (1992), "(t)he Court will not review a

question that was *neither* pressed *nor* passed on below." [emphasis in original] *E.E.O.C. v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986).

## CONCLUSION

This case does not raise the special or important issues which are a condition prerequisite for the granting of a writ of certiorari. It involves issues of proof, applying New Jersey law. For the foregoing reasons, respondent requests that the Court deny the petition for a writ of certiorari.

Respectfully submitted,

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